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No. 02-563

IN THE

Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, *ET AL.*,
Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

AMICUS BRIEF OF THE AMERICAN FAMILY ASSOCIATION CENTER FOR LAW AND POLICY IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS

The American Family Association Center for Law and Policy (AFA-CLP) is the legal arm of the American Family Association. AFA-CLP litigates vigorously in defense of the free speech rights of those who stand up for life and family. *E.g.*, *United States v. Vazquez*, 145 F.3d 74 (2d Cir. 1998) (successful defense of pro-life sidewalk counselor against FACE charge): *Clear Channel Broadcasting, Inc. v. Florida Family Ass'n, Inc.*, No. CIO-01-1085 (Fla. Circ. Ct. filed Feb. 6, 2001) (current defense of anti-pornography activists against RICO suit).

The AFA-CLP is deeply concerned at the horrendously anti-speech precedent set by the en banc Ninth Circuit in this case. AFA-CLP files this brief urging Supreme Court review.[1]

SUMMARY OF ARGUMENT

This is a textbook free speech case. The provocative posters and website at issue contain classic political speech and fall into no recognized exception to the First Amendment. The controversial nature of the speech in question makes the protections of the First Amendment especially important here. The Ninth Circuit's "poster pattern" theory of liability is unprecedented, unwarranted, unworkable, and unprincipled. This Court should therefore grant review.

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[1]No counsel for a party authored this brief in whole or in part. No person or entity aside from the AFA-CLP, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

The AFA-CLP is a division of the American Family Association (AFA). The AFA has no parent corporation and no stock.

In the alternative, this Court should summarily reverse or vacate the Ninth Circuit's judgment. The Ninth Circuit's novel rationale for affirmance is not only legally indefensible, it is also inadequate to sustain judgment here, where the jury was not limited to the theory of liability subsequently embraced on appeal. Remand is also warranted in light of the following: (1) respondent's theory of Hobbs Act extortion (the sole RICO predicate here) mirrors the faulty Hobbs Act "extortion" theory this Court is reviewing in *Scheidler v. NOW*, No. 01-1118 (to be argued Dec. 4, 2002), and thus may merit dismissal in light of the forthcoming *Scheidler* decision; (2) respondents lack RICO standing because personal injuries (like threats of personal harm) are not injuries to "business or property" as required under RICO, 18 U.S.C. § 1964(c); and (3) respondents went to the jury on a nonexistent (and thus jurisdictionally inadequate) FACE "conspiracy" claim, a defect that fatally infects the unitary FACE liability verdict here.

ARGUMENT

This is a classic, textbook free speech case. The provocative posters and website at issue fall into no recognized exception to the protections of the First Amendment. Respondents did not even contend that liability should rest on the claim that the speech in question constituted "fighting words," or obscenity, or defamation, or unlawful incitement. While respondents did go to the jury on the claim that the speech was a "threat," *see* Pet. App. 249a-253a, the en banc Ninth Circuit correctly acknowledged that the posters and website contained no threatening language. Pet. App. 7a, 39a. *See* Pet. App. 10a-12a (recounting speech in question). The First Amendment therefore requires judgment for petitioners.

The Ninth Circuit, by a 6-5 vote, sought to evade this result by

the unveiling of a new exception to the First Amendment: "format" liability. This unprecedented -- and theoretically unlimited -- exception strikes at the very heart of the First Amendment. This Court should grant review because of the grave importance of the questions presented.

I. THE FIRST AMENDMENT IS MOST NECESSARY WHEN THE SPEECH IS MOST CONTROVERSIAL.

Speech that is popular or pleasant has little need for constitutional protection. *City of Houston v. Hill*, 482 U.S. 451, 462 n.11 (1987). The true test of the right to free speech, under the First Amendment to the United States Constitution, is the strength of the protection that right affords to speech that is unpopular, unpleasant, disturbing, or even despised. *E.g.*, *United States v. Eichman*, 496 U.S. 310 (1990) (flag burning).

Accordingly, this Court has insisted in case after case that the right to free speech embraces "vehement, caustic, and sometimes unpleasantly sharp attacks" upon the views or conduct of others, *New York Times, Co. v. Sullivan*, 376 U.S. 254, 270 (1964), and that the First Amendment protects even such "deeply offensive" speech as "virulent ethnic and religious epithets, *see Terminello v. Chicago*, 337 U.S. 1 (1949), vulgar repudiations of the draft, *see Cohen v. California*, 403 U.S. 15 (1971), and scurrilous caricatures, *see Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988)." *Eichman*, 496 U.S. at 318-19. *Accord Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 774 (1994) ("insulting, and even outrageous, speech") (internal quotation marks and citations omitted).

The premise of the Ninth Circuit's holding is that petitioners should have known that the *format* of their two "GUILTY" posters would scare the petitioners. But where the communication itself contains no threats, there is no "scary

speech" exception to the First Amendment. If there were, the decisions in *Terminello* and numerous other precedents of this Court would have to be overruled. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *Watts v. United States*, 394 U.S. 705 (1969) (per curiam); *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973) (per curiam); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971).

The Ninth Circuit's *ratio decidendi* is thus completely foreign to this Court's First Amendment jurisprudence. But that is not all.

The Ninth Circuit's theory is also facially absurd -- "Wanted" posters have a lengthy history in law enforcement, satire, political rhetoric, and Old West lore, and their format has never been deemed an unlawful "threat."

Moreover, the Ninth Circuit's theory is facially vague. What is a "Wanted-*type*" poster? And how close in time or frequency must the coincidence be between the utterance or publication of the speech (by third parties) and the commission of unlawful acts (by still other third parties) in order to generate a "poster pattern," or other "scary speech" connection, that delegitimizes otherwise pristine First Amendment activity? How long does the delegitimization last? And to whom does it apply -- all speakers, or just those with certain political viewpoints? If the Ninth Circuit's standard of liability were embodied in a statute, that statute would be struck down for vagueness and overbreadth at its first appearance in court.

This Court should grant review.

II. THIS CASE MERITS SUMMARY REVERSAL.

In the alternative, this Court should summarily reverse the judgment of the Ninth Circuit. This disposition would be

appropriate for several reasons.

First, the Ninth Circuit's outlandish theory of threats liability is patently indefensible.

Second, even if the Ninth Circuit were correct in its analysis, the judgment would have to be vacated for the simple reason that the jury *was not limited to the Ninth Circuit's theory of the case*. *See* Pet. at 25-26. Thus, the jury may have *rejected* the "poster pattern" (the theory the Ninth Circuit endorsed) because of the tenuousness of supporting evidence, and instead embraced the argument that the *words* of the poster were threatening (the theory the Ninth Circuit rejected). *See* Pet. App. 251a-253a (instructing jury to determine whether petitioners' "statements" were threats). Such circumstances necessitate at least a retrial. *Griffin v. United States*, 502 U.S. 46, 53-56, 59 (1991).

Vacation and remand to the district court would have the salutary effect of promptly erasing the Ninth Circuit's pernicious decision. And while an outright reversal would be preferable to a retrial, vacation and remand could ultimately have a comparable effect, at least in part, for the reasons set forth below.

A. Defective Theory of Hobbs Act Extortion.

The RICO claim may need to be dismissed in light of this Court's forthcoming decision in *Scheidler v. NOW*, No. 01-1118 (consolidated with *OR v. NOW*, No. 01-1119) (to be argued Dec. 4, 2002).

In the present case, respondents' theory of Hobbs Act "extortion" -- the sole predicate offense for the RICO claim, Final Jury Instructions p. 29 -- suffers from the same defects as the Hobbs Act "extortion" claim this Court is reviewing in *Scheidler*. *See* Pet. App. 257a. Namely, there was no requirement that the jury find the element of "obtaining of

property." *See* Final Jury Instructions pp. 9 ("Plaintiffs claim that [the alleged threats were] made in an unlawful attempt to prevent the plaintiff from continuing to provide abortions"), 24 (RICO enterprise allegedly had "purpose . . . to drive [abortion providers] out of business"), 30 ("extortion" means threat designed "to deprive a plaintiff of his or her property"), 32 ("Property" includes "right to provide abortion services free from wrongful threats, violence, coercion, or fear" and "may also include money plaintiffs contend they were required to spend on security measures"), 33 (extortionate "intent" means "intent of depriving a plaintiff of his or her property or protected right to provide abortion services"), 34 ("deprive . . . of property or protected rights"), 35 (same).

Should this Court reverse in *Scheidler*, respondents' extortion predicates should also merit dismissal, thereby terminating the RICO claim.

B. Absence of RICO Standing.

The RICO claim must also fail for want of RICO standing. (This is grounds for immediate summary reversal.)

RICO only confers standing on a private party "injured in his *business or property* by reason of a violation of section 1962," 18 U.S.C. § 1964(c).

This Court has interpreted the RICO injury requirement as follows:

> [A] plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.

Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496-97 (1985). As this Court explained in construing an identical

phrase in the federal antitrust statute, "The phrase 'business or property' . . . retains restrictive significance. It would, for example, exclude personal injuries suffered." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). As one court explained in a RICO case,

> had Congress intended to create a federal treble damages remedy for cases involving bodily injury, injury to reputation, mental or emotional anguish, or the like, all of which will cause some financial loss, it could have enacted a statute referring to injury generally, without any restrictive language.

Grogan v. Platt, 835 F.2d 844, 847 (11th Cir.) (internal quotation marks, citation, and emphasis omitted), *cert. denied*, 488 U.S. 981 (1988).

In construing the injury to a business or property requirement, the lower courts have repeatedly held that RICO does not apply to allow recovery for personal injuries, and thus excludes claims for such items as bodily injury, mental suffering, injury to reputation, loss of self-esteem, loss of earnings due to wrongful death, and harm to intangible -- albeit valuable -- property interests. *See Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163, 1169 (3d Cir. 1987) (rejecting RICO claim predicated on an allegedly extortionate letter sent to residents: "The named plaintiff has alleged only injury in the nature of mental distress, not an injury 'in his business or property.' Therefore he has no cause of action on a RICO claim . . . ."); *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990) (personal injury, including injury to security and peace of mind, resulting in pecuniary loss, is not compensable under RICO); *Rylewicz v. Beaton Services, Ltd.*, 888 F.2d 1175, 1178-80 (7th Cir. 1989) (affirming dismissal of RICO claim for personal injuries suffered from various acts of "harassment, intimidation and terrorism"

because such injuries are not injuries to business or property); *Schiffels v. Kemper Financial Servs., Inc.*, 978 F.2d 344, 353 (7th Cir. 1992) ("The defendants' actions might have caused Schiffels embarrassment, humiliation, and emotional distress, but injury 'to business or property' does not include such personal injuries, even if those injuries resulted in a pecuniary loss"); *Libertad v. Welch*, 53 F.3d 428, 436-37 (1st Cir. 1995) (feelings of intimidation and harassment resulting from being blocked by pro-life protesters do not constitute injury to business or property within RICO); *Grogan v. Platt*, 835 F.2d 844, 847 (11th Cir. 1988) (no recovery permitted under RICO for economic aspects of personal injuries inflicted by predicate acts involving murder), *cert. denied*, 488 U.S. 981 (1988); *Bast v. Cohen, Dunn & Sinclair, PC*, 59 F.3d 492, 495 (4th Cir. 1995) (rejecting RICO claim for "extreme mental anguish" allegedly resulting from defendant's recording of past communications: "An allegation of personal injury and pecuniary losses occurring therefrom are not sufficient to meet the statutory requirement of injury to 'business or property'"); *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 918 (3d Cir. 1991) (no recovery for medical expenses and emotional distress resulting from plaintiff residents' exposure to toxic waste); *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 644 (6th Cir. 1986) ("the phrase 'business or property' . . . would, for example, exclude personal injuries suffered"; thus sickness, poisoning, emotional distress, and death from exposure to toxic chemicals in workplace are personal injuries not cognizable under RICO) (emphasis omitted); *Fleischhauer v. Feltner*, 879 F.2d 1290, 1300 (6th Cir. 1989) ("Recovery for physical injury or mental suffering is not allowed under civil RICO because it is not an injury to business or property"), *cert. denied*, 493 U.S. 1074 (1990); *Oscar v. University Students Co-op Ass'n*, 965 F.2d 783 (9th Cir. 1992) (*en banc*) (upholding dismissal of RICO claim for loss of value

to an intangible property interest, i.e., "use and enjoyment" of a residence, where plaintiff renter could not show injury to her leasehold interest by diminished fair market value), *cert. denied*, 506 U.S. 1020 (1992).[2] The law on this issue is clear -- personal injury is not cognizable under RICO's injury to "business or property" restriction.

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[2]*See also Jerry Kubecka, Inc. v. Avellino*, 898 F. Supp. 963, 969 (E.D.N.Y. 1995) ("plaintiffs' fears for their personal safety and any expenses incurred in an attempt to allay such fears are not injuries to 'business or property' within the meaning of section 1964(c)"); *Manson v. Stacescu*, 823 F. Supp. 76, 81 (D. Conn. 1993) (murder threat not injury to business or property under RICO); *Bennett v. Centerpoint Bank*, 761 F. Supp. 908, 916 (D.N.H.) ("In Count XXI, Bennett alleges that defendant Hahn threatened him physically on the telephone . . . and as a result Bennett was injured by his fear for his personal safety . . . . [T]he court finds that this type of injury is not an injury to 'business or property' as required by section 1964(c)", *aff'd*, 953 F.2d 634 (1st Cir. 1991); *Allman v. Philip Morris, Inc.*, 865 F. Supp. 665, 667-69 (S.D. Cal. 1994) (personal injuries from addiction to nicotine fail to come under RICO; out-of-pocket expenses incurred for treatment are the economic consequences of personal injuries and not recoverable under RICO); *McMurtry v. Brasfield*, 654 F. Supp. 1222, 1225 (E.D. Va. 1987) (dismissing RICO claim for emotional distress and interference with family relations); *Kouvakas v. Inland Steel Co.*, 646 F. Supp. 474, 476 (N.D. Ind. 1986) (dismissing RICO claim for loss of employment caused by emotional distress due to harassment and abuse); *Callan v. State Chemical Mfg. Co.*, 584 F. Supp. 619, 623 (E.D. Pa. 1984) (dismissing RICO claim for "mental anguish, loss of self-esteem and confidence or damaged reputations"); *Connor v. Halifax Hosp. Med. Ctr.*, 135 F. Supp. 2d 1198, 1219 (M.D. Fla. 2001) (loss of life is not injury to business or property under RICO); *Campbell v. A.H. Robins Co., Inc.*, 615 F. Supp. 496, 501 (W.D. Wis. 1985) (injuries caused by Dalkon Shield IUD do not fall within RICO: "it is evident to this Court, that personal injuries are clearly not injuries to either business or property within the context of this statute"); *Bast v. A.H. Robins Co., Inc.*, 616 F. Supp. 333, 335 (E.D. Wis. 1985) ("illness and injuries secondary to their contraceptive use of the Dalkon Shield IUD" are not injuries to business or property within RICO).

Furthermore, if the court determines that the asserted business or property injury is merely derivative of personal injury, then the RICO claim fails. *Grogan v. Platt*, 835 F.2d at 846; *Drake v. B.F. Goodrich Co.*, 782 F.2d at 644 (RICO claim not available to employee against employer for personal injuries suffered on the job, despite harm to employment); *Kouvakas v. Inland Steel Co.*, 646 F. Supp. at 477 (plaintiff's "loss of employment" was not actionable under RICO because it "deriv[d] from the personal injuries he suffered by reason of the defendants' alleged abuse and harassment").

In particular, where the plaintiff alleges emotional distress or invasion of privacy and business or property damages in the form of derivative loss, the courts find as a matter of law that the plaintiff has crossed the line from a proprietary-type claim (cognizable under RICO) to a personal injury claim that merely has negative pecuniary consequences (not cognizable under RICO). *See Doe v. Roe*, 958 F.2d 763, 770 (7th Cir. 1992); *Globe Int'l, Inc. v. Collins*, 9 Cal. App. 4th 393, 398-99, 401, 12 Cal. Rptr. 2d 109, 112 (1992) (dismissing RICO claim because "[t]he invasion of privacy and libel injuries upon which the RICO claim is based are like those claimed by the plaintiff in a personal injury action"). The Seventh Circuit in *Doe* examined the distinction between RICO business or property injury and the economic aspects of personal injury claims, as follows:

> [Plaintiff] blurs the distinction between proprietary and personal injuries. Contrary to what [plaintiff] seems to suggest, whether she can show a financial loss does not, by definition, establish that she has suffered a business or property injury within [RICO]. Most personal injuries -- loss of earnings, loss of consortium, loss of guidance, mental anguish, and pain and suffering, to name a few -- will entail some pecuniary consequences. Perhaps the economic

> [consequences] of such injuries could, as a theoretical matter, be viewed as injuries to "business or property," but engaging in such metaphysical speculation is a task best left to philosophers, not the . . . judiciary.

Doe v. Roe, 958 F.2d at 770; *see Grogan v. Platt*, 835 F.2d at 847 (the alleged "pecuniary losses are so fundamentally a part of personal injuries that they should be considered something other than injury to 'business or property'"); *Oscar*, 965 F.2d at 787 (looking past the labels to "[w]hat [the plaintiff] is really complaining about" and finding that it was personal, not proprietary).

Likewise, the courts dismiss claims under RICO that apply business or property labels to alleged injury but do not assert any tangible, actual pecuniary losses. *Oscar*, 965 F.2d at 785 (plaintiff must show a "concrete financial loss, and not mere injury to a valuable intangible property interest") (internal quotation marks omitted); *Steele v. Hospital Corp. of America*, 36 F.3d 69, 70 (9th Cir. 1994) (same); *In re Taxable Municipal Bond Securities Litigation*, 51 F.3d 518, 523 (5th Cir. 1995) (citing *Steele* and *Oscar* and concluding that "because the alleged injury is speculative and does not show a conclusive financial loss, we hold that [plaintiff's] RICO suit fails for lack of standing"); *Berg v. First State Ins. Co.*, 915 F.2d at 463-64; *Fleischhauer*, 879 F.2d at 1300 (restricting recovery under RICO to "amounts actually invested"); *Forsyth v. Humana, Inc.*, 827 F. Supp. 1498, 1519 (D. Nev. 1993) ("not all injuries are compensable under RICO, but rather only those which are given by a 'concrete financial loss'"); *Lui Ciro, Inc. v. Ciro, Inc.*, 895 F. Supp. 1365, 1378 (D. Haw. 1995) (risk of financial loss "does not equate with the concrete showing of actual financial loss required under RICO").

In *Berg*, a group of insureds claimed that "they lost a valuable

property interest when their insurance was cancelled." *Berg v. First State Ins. Co.*, 915 F.2d at 463. The district court disagreed and granted summary judgment for defendants on the RICO claim. The appellate court affirmed the summary judgment ruling, despite the existence of various factual disputes, finding that the insureds' characterization of property injury was insufficient as a matter of law. *Id.* Specifically, the court held that the insureds' failure to establish actual financial loss or injury rendered the claim unrecoverable under RICO:

> Absent a showing sufficient to establish the existence of actual injury, summary judgment is required. . . . We explained [in a previous decision] that by "actual injury," we meant financial loss or injury. . . . [The insureds] claim injury to a valuable intangible property interest in their liability policies when the policies were canceled. . . . This statement [about loss of peace of mind concerning potential financial losses in future] describes a personal injury in the form of emotional distress, not a claim for injury to property as [RICO] requires.

Berg, 915 F.2d at 464 (emphasis in original; internal citations and editing marks omitted).

In the present case, respondents' claims of injury are in the nature of personal injuries, namely, fear resulting from alleged threats.[3] (The only RICO damages respondents sought were for "security measures" undertaken in response to the fear respondents allegedly felt. Final Jury Instructions pp. 41, 43.) Hence, respondents lack RICO standing.

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[3]The two business respondents obviously could not suffer personal injuries. But neither were they mentioned in the alleged threatening statements. Pet. App. 188a. Their claimed injury is strictly derivative, Pet. App. 208a, and hence must fall with the primary claims.

C. Nonexistence of FACE Civil Conspiracy Claim.

The FACE judgment must fall because of the nonexistence of respondents' civil FACE conspiracy claim.

There is a general federal *criminal* conspiracy statute. *See* 18 U.S.C. § 371. There is, however, no general federal *civil* conspiracy statute. Hence, the existence of a federal *civil wrong* of conspiracy, and the existence of a cause of action therefor, depend upon the particular statute in question. RICO, for example, expressly prohibits conspiracies, 18 U.S.C. § 1962(d), and authorizes civil suits for such conspiracies, 18 U.S.C. § 1964(c) ("violation of section 1962"). FACE, by contrast, contains no substantive conspiracy provision, 18 U.S.C. § 248(a), and no civil remedies for conduct outside the scope of FACE, 18 U.S.C. § 248(c)(1)(A). In short, there is no such tort as a FACE conspiracy, and no such claim as a civil suit for a FACE conspiracy.

Respondents went to the jury on both this nonexistent FACE conspiracy theory and a substantive FACE claim. Pet. App. 253a-256a. The jury was not required to distinguish between the two FACE theories. For each defendant, the jury was simply asked, "Did [defendant] violate or conspire to violate FACE?" Verdict at 3-17. Hence, the jury verdict may rest in whole or in part upon a nonexistent cause of action. This requires reversal. *Griffin v. United States*, 502 U.S. 46, 53-56, 59 (1991).

The Ninth Circuit ruled that petitioners waived this argument. Pet. App. 50a n.16. But the nonexistence of a cause of action is jurisdictional: a fictitious claim confers no federal subject matter jurisdiction. *Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974). Hence, this defect cannot be waived.

This defect is also likely to require a different result in any remand. The Nuremberg Files website, for example, was the work of an independent nonparty. Absent a conspiracy theory,

it is difficult to see how petitioners could be held liable for this website.

CONCLUSION

This Court should grant certiorari. In the alternative, this Court should summarily reverse or vacate the judgment below and remand with instructions to vacate the district court's judgment.

Respectfully submitted this 12th of November, 2002,

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